

Model building Act offers a constructive future

Restructuring and reform in the building industry must go hand-in-glove with uniformity of rules, standards, products etc. Kim Lovegrove gives the legal approach in this article.

When the Australian Uniform Building Regulations Co-ordinating Council, (comprising the Directors General of Planning and Housing from each State and the Department Heads of Building Control) commissioned the consultancy they were mindful of the need to have a model building regulatory system that could form the basis of facilitating the following:

- Legislation to complement the Building Code of Australia — the uniform technical creed that dictates standards for interstate construction.
- National accreditation of construction products and systems.
- The breaking down of administrative and constitutional barriers that inhibit optimum efficiency for the construction industry.
- Uniform and transportable qualifications.
- Much needed liability reforms.

The greater part of the model legislation has achieved the philosophical objectives referred to.

One of the representatives speaking on behalf of a major building trade association recently made some poignant comments in relation to the benefits of uniformity.

"In the building industry and in building construction terms, there are eight distinct pieces of legislation, each with its own inherent personality, all regulating the same industry. Eight Acts one industry! The absurdity, and economic dangers in this circumstance are becoming increasingly apparent.

"The inefficiencies and delays that result from this lack of uniformity create such diverse and extensive costs that they are impossible to totally quantify. Interstate contractors having to contend with briefing eight separate sets of solicitors, or eight separate sets of consultants should according to the dictates of logic have to only contend with one eighth."

He summed up his remarks by saying that, "Uniform laws are of paramount importance to the building industry and will be conducive to more versatile and commercial environments."

Dispute resolution

Research has uncovered a remarkable maze of legislation governing dispute resolution and inter-State/Territory consensus was that a 'one stop shop' approach to dispute resolution was needed.

The legislation contains the system whereby the "Building Appeals Board" is the sole, primary and all encompassing appellate tier with jurisdiction over any dispute coming within the Act, the Regulations or the Building Code of Australia. The 'one stop shop' reflects a desire for swift, cost effective and appropriate qualified decision making.

Private certification option

Past building booms characterised by strong resurgent construction activity have revealed that local authority resources have been severely stretched, especially with regards to building approval functions.

This legislation has the ability to cope with the unsatisfactory situation that currently prevails. It provides for the engagement of consultant building surveyors who will be able to certify the building approval, inspection and issue of a Certificate of Occupancy. While the initial cost for this option may be greater for the engagement of a private building certifier, the savings gained by reduced building approval processing times and resulting loan interest savings, standing and holding costs will be considerable.

Liability reforms

One of the most profound innovations in the legislation revolves around the liability reforms for defective construction. This comes within the ambit of two main themes — liability capping and

reforms of joint and several liability.

Currently local authorities and insured practitioners find themselves on the receiving end of exceeding vehement forms of litigious assault due to their status as guaranteed insured defendants. It is possible to have a situation where a financially solvent defendant is held marginally responsible but ends up paying 100% of the award.

The judicial rationale is illogical, unfair and a legacy from the UK.

Obviously the exposure of the insured defendant has led to excessively high insurance premiums due to the potential for the insured to 'pick up the whole tab'.

The legislation corrects this problem in a straightforward fashion. The courts will be required to apportion responsibility so that a given defendant will not have to pay more than his or her judicially determined portion. If the defendant is held liable for 5%, that is what the defendant will pay.

The ramifications of the legislative innovations are logical, fair and commercially viable.

The liability laws will enable easier quantification of risks for insurers and a return to favour of PI cover. As a result building practitioners should be less inclined to divest themselves of assets because PI cover will be more affordable.

10 year liability capping

The second most important innovation relates to 10 year liability capping. The present operation of statute of limitations is governed by an English case, *Pirelli General Cable Works Ltd v Oscar Faber and Partners* (1982) AC 1 where it was held that the cause of action in a claim for tort for negligence in the design and workmanship of a building accrues at the day of damage, whether the damage is discernible or not.

The present law is quite unsatisfactory as the victim of a negligent act, will find that the trigger date or the period of

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limitation is the date when the damage actually occurs, and at such a date the damage might not be discernible hence potential plaintiffs might find themselves barred from taking legal action, before they knew or even could be in a position to know that it suffered damage.

The model legislation ensures that upon completion of a building or structural renovation an Occupancy Permit must be issued. The 'OC' will trigger the beginning of the 10 year liability limitation period. At the end of 10 years, no party will be able to issue legal proceedings in tort for negligence for the design or workmanship of a building for structural property damage. This does not apply to fatality or bodily injury however, hence it is still open for a plaintiff to institute proceedings if someone is killed or injured as a result of defective workmanship of such a magnitude.

The ramifications will be legislative certainty, quantifiable risks and hopefully lower insurance premiums.

National accreditation

The legislation will recognise nationally accredited building products and systems. The current systems require developers of new and innovative products and systems to seek the approval of some 850 local councils to gain national recognition for use in construction projects. It is an

unduly complex and bureaucratic arrangement that severely impedes the introduction of modern approaches to construction and the manufacture of innovative building materials and systems. The very strong emphasis here is on one Australia, one market.

Uniform qualifications

A national system for the recognition of qualification standards for building practitioners such as building surveyors, building inspectors, architects, engineers and conceivably builders has been long overdue.

The current situation of having onerous restrictions on the transportability of skills and expertise from State to State will be reformed and replaced. The introduction of a new accreditation system and new national approach to industry qualification will greatly enhance the exportability of construction technology, skills and hardware.

Another important benefit of the model Act is the provision of uniform umbrella legislation to complement the uniform technical regulations in the Building Code of Australia (BCA). Currently as the States and Territories adopt the BCA, adoption is accompanied by batteries of variations.

As one of the primary aims of the Building Codes of Australia was to facili-

tate uniform technical requirements there is a grave risk that this admirable aim will be defeated if a mechanism is not put in place to persuasively cull the variations. There is a strong view that the only way that this can happen is for there to be uniform umbrella legislation to monitor uniform compliance, and eliminate parochially driven amendments to the BCA against the national interest.

To ensure interpretation and to address and resolve any identified faults with the Model Act the Australian Institute of Building Surveyors and Home Wilkinson & Lowry will be conducting a major joint venture seminar series in April/May in every State and Territory as part of the education phase.

This article was prepared by Kim Lovegrove, Partner and head of the Building Law Group of solicitors, Home Wilkinson & Lowry and Lawrie Elms, executive director of the Victorian Chapter of the AIBS.

Lovegrove was engaged as consultant to AUBRCC to assist with facilitating this uniform legislative initiative. He has worked very closely with Lyall Dix (chairman of AUBRCC) and project supervisor.